

BEALE ON THE CONFLICT OF LAWS

H. L. McCLINTOCK†

The publication in 1934 of the American Law Institute's Restatement of the Conflict of Laws made the first important contribution to the American literature dealing with the subject since the publication of Story's treatise in 1834.¹ It has now been followed by the publication of a treatise² in the form of a commentary on the Restatement written by the reporter who was largely responsible for the content of the Restatement. As a result, the student of this subject who has formerly been compelled to search laboriously for his cases through many different topics of the digests and encyclopedias, and to obtain his critical discussion from widely scattered articles and comments in legal periodicals, now finds at his hand a systematic exposition of the subject prepared by a group of those who are experts in the field, aided by the criticisms and suggestions of eminent judges and practicing lawyers. This is accompanied by the most elaborate collection of cases dealing with the subject which has ever been made, analyzed and compared by one who has been the outstanding teacher of the subject for the past forty years. Such a student might easily be so overwhelmed with this bountiful feast where before there has been a near-famine, that his gratitude would lead him to accept without question what was spread before him. But, probably fortunately for him, he is not permitted to enjoy his new abundant life in ease and comfort. During the time the feast was being prepared, he has been warned that if he swallows it whole, he will surely suffer mental indigestion, and now his attention is being called to the various particulars in which the feast does not measure up to the necessities of a properly balanced diet.

During the whole period occupied by the preparation of the Restatement, numerous critics have been persistently engaged in an attack upon the fundamental conceptions on which the work was to be based. This attack was a part of the general revolt of the new realists against prevailing legal concepts and methods, but in the field of the conflict of laws it was particularly directed at the reporter of the Restatement. It seems at times as if the critics were more anxious to score a point against Professor Beale than to give us light on the merits of the controversy. In a recent article reviewing

† Ph. B., 1903, Colorado College; LL. B., 1906, University of Denver; S. J. D., 1924, Harvard University; author of *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933, and other articles in legal periodicals; Professor of Law, University of Minnesota.

1. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

2. JOSEPH H. BEALE, THE CONFLICT OF LAWS (1935) 3 volumes. Hereafter in this article the work of the American Law Institute will be cited simply as RESTATEMENT, and that of Professor Beale as TREATISE.

the Restatement,³ the authors begin by an attempt to identify the concepts of the Restatement with those of Professor Beale, and then quote, as the embodiment of those concepts, statements which were not intended to relate to conflict of laws, but were directed to the content of the teaching in a modern law school. It does not at all follow that a belief that there is a body of legal principles, generally accepted in all common law jurisdictions which can be made the basis of our legal studies, necessarily implies a belief that those principles have an *a priori* validity or an existence apart from their general acceptance as the law of particular jurisdictions, and the quoted statement furnished no ground for doubting the sincerity of Professor Beale in his oft-repeated statement that the rules of the conflict of laws, like all other common law rules, are law only in so far as they are the law of particular jurisdictions and that, except as the power may be limited by constitutional provisions, any state may, by statute or judicial decision, change the rules it will apply in conflicts cases as freely as it may change any other rules of the common law.⁴

In practically all criticisms of the work of Professor Beale, stress is placed on the method to be used in the solution of conflicts problems, rather than on the results reached in particular cases. The article which really began the controversy⁵ charged Professor Beale and those who have followed him with deducing all of their principles from certain *a priori* assumptions, while the writer proposed to follow the scientific method of first observing what the courts had done, as distinguished from the reasons they had given to justify their acts, and, from the observations thus made, to draw certain generalizations which would be of value in predicting what the courts would do in the future. This line of attack has since been followed by other critics.⁶ But a comparison of what Professor Beale and his critics have respectively done, as distinguished from what they have professed they were going to do, creates at least a suspicion, if it does not demonstrate, that Professor Beale has more consistently followed the approved inductive method than have his critics. Certainly he has given much more evidence of having made an extensive observation of the decided cases than have those who accuse him of mere deductive reasoning, and in many cases he has radically departed from the language used by the court to base a generalization upon the results of the cases. Conspicuous examples are his citing of *Edgerly v. Bush*⁷ in support of the principle that a state into which a chattel has been

3. Lorenzen and Heilman, *The Restatement of the Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555.

4. 1 TREATISE, § 5.3.

5. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457.

6. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736; Heilman, *Judicial Method and Economic Objectives in Conflict of Laws* (1934) 43 YALE L. J. 1082.

7. 81 N. Y. 199 (1880).

taken without the consent of its owner has no jurisdiction to divest the owner of his title,⁸ and his deduction of the principles of divorce jurisdiction from the decision of *Haddock v. Haddock*.⁹ An equally striking but less known example of the same process is his deduction from the actual holding of *Union Securities Co. v. Adams*,¹⁰ of the principle that the law of the state from which a chattel was wrongfully taken without the owner's consent determined the title, though the court based its decision on a refusal to recognize a Texas title to chattels because Texas refused to recognize a title acquired in other states under similar circumstances.¹¹ We may not always believe that Professor Beale's generalizations are justified by the cases on which he bases them, but a study of his work does not support the criticism that they have been made without a study of substantially all of the pertinent cases, nor that they have been based on what the courts have said rather than what they have done.

After stating his criticisms of Professor Beale's assumed method of approach, Professor Cook, in the article referred to,¹² examines the decisions in some cases well known to every student of the subject and, on the basis of those cases, makes a strong argument that some of Professor Beale's generalizations, if based only on those cases, are too broad. Particularly effective is his demonstration that the principle of recognition and enforcement of foreign created rights as the basis for conflict of laws rules would lead to the adoption of the *renvoi* theory. There seems to be no escape from his conclusion that the right created by the foreign law is the right which the courts administering that law would enforce in that particular situation, not the right they would enforce where all of the operative facts occurred in their own jurisdiction. The Restatement¹³ and the Treatise¹⁴ both reject the doctrine of *renvoi*, but nowhere does Professor Beale satisfactorily reconcile such rejection with his general acceptance of the principle of enforcement of foreign created rights. Professor Cook's conclusion from the cases he examines that the courts do not recognize and enforce foreign created rights, but create rights by their own conflict of laws rule which are identical with, or similar to, the rights which would have been enforced in the other jurisdiction if all of the facts had occurred there, seems at casual reading to be a valid one, but an examination of other cases leaves it at least doubtful. Certainly there are not enough cases on the question in this country to justify the assertion that the courts have rejected the *renvoi*. Apparently no court of last resort has considered the question with any comprehension of its

8. 1 TREATISE, § 50.2.

9. 201 U. S. 562 (1906). See 1 TREATISE, § 113.10; cf. Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

10. 33 Wyo. 45, 236 Pac. 513 (1925).

11. 2 TREATISE, § 268.2.

12. *Supra* note 5.

13. §§ 7, 8.

14. Vol. 1, §§ 7.3, 8.1.

implications, and some of them have applied it in the actual decision of cases.¹⁵ The Restatement and the Treatise recognize that it applies to questions of status and title to land. Can we not generalize from these cases, in harmony with the general principle of recognition of foreign created rights, that such rights will be enforced, as the foreign court would enforce them, except where that is rendered impossible because the result would be an endless reference from one law to the other and back again? It is certainly no argument against the general validity of a common law doctrine that the courts refuse to apply it in a limited group of cases where its application would lead to an absurd result.

Some of Professor Cook's other deductions are not so persuasive. He suggests a plausible explanation for the decision of *Slater v. Mexican Nat. R. R.*¹⁶ which does not rest on the doctrine that no law except that where a tort occurred can attach legal consequences to the act, but his explanation does not fit the decision of *Cuba R. R. v. Crosby*,¹⁷ that a court of the United States could not give damages for an injury caused in Cuba where there was no proof of the law of Cuba and no presumption that it was the same as our law. He approves the dictum of Judge Learned Hand¹⁸ that if the enforcement of a foreign created right is the basis for decision, the judgment of our courts should be expressed in dollars which would purchase, according to the rate of exchange at that date, the amount of foreign money for which the foreign court would render the judgment, and concludes therefrom that the doctrine is not applied by our courts. Unfortunately for his argument, Mr. Justice Holmes, writing for the majority of the United States Supreme Court in a later case,¹⁹ accepted the same dictum as a premise and concluded therefrom that our courts must render such a judgment.

One of the early objections to the work of the Restatement reporter and advisers was that they treated the concept of domicile as one concept, regardless of the legal problem which called for its application.²⁰ In a late criticism of the Restatement²¹ about half a page is devoted to a repetition of the objection. Not a single authority of any kind is cited for the statement that the courts "generally, if not almost invariably, deal with and determine domicile solely with regard to the particular kind of legal consequence or

15. See Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COL. L. REV. 190, 327; Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country"* (1918) 27 YALE L. J. 509; Schreiber, *The Doctrine of the Renvoi in Anglo-American Law* (1918) 31 HARV. L. REV. 523.

16. 194 U. S. 120 (1904).

17. 222 U. S. 473 (1912). It is interesting to note that both of these opinions, based on the principle of enforcement of foreign created rights were written by Holmes, J., upon whom Professor Cook so largely relies in his attack on Professor Beale's methods.

18. In *Guinness v. Miller*, 291 Fed. 769 (S. D. N. Y. 1923), *aff'd sub nom. Hicks v. Guinness*, 269 U. S. 71 (1925).

19. *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U. S. 517 (1926).

20. See 3 PROCEEDINGS AM. L. INST. (1925) 225 *et seq.*

21. Lorenzen and Heilman, *supra* note 3, at 561.

effect involved in each particular case. Thus, for the purpose of succession or distribution at death the domicil of a person might be determined to have been in one state while for the purpose of a particular kind of tax it might be determined to be in another." Of course it "might be", but has it been? There probably would be no question relating to domicil with regard to which the courts would be so apt to make a distinction because of the problem involved as the question whether the controlling intent is the intent to choose a legal domicil or the intent to choose a home, for the courts might well approve an intent to select a particular law to govern the distribution of personal assets after death, but frown on an attempt to evade the payment of higher taxes levied by the jurisdiction in which the taxpayer's home was located. This question was recently raised in cases²² in two different states involving an inheritance tax of sufficient size to justify an exhaustive examination of the question. In neither opinion is there any suggestion that the governing concepts of domicil differ in any respect from the concepts applied when other issues are involved. In the Pennsylvania opinion the court first rejected several cited cases as not applicable to the facts, rejected another as inapplicable because it dealt with foreign attachment,²³ and then discussed or cited thirty-five cases dealing with the element of intent in domicil. In the reference to most of these cases, the court gives no indication as to the nature of the question under consideration. An examination of the original reports of the cases cited shows that two of them are dicta in cases involving no problem of domicil, seventeen are cases involving taxes of various kinds, nine involve the determination of some question relating to estates of decedents, two involve questions of jurisdiction of federal courts and one each involve right to vote, legitimation, guardianship, naturalization, and trust *inter vivos*. In the New Jersey case eight cases are cited, of which three deal with taxation and one each with federal jurisdiction, construction of statute against trading with the enemy during the civil war, divorce, right to vote, and probate of a will. Even if the number of tax cases is not explainable solely by the fact that the attempt to maintain a legal domicil apart from the home is generally to escape higher taxes, it is not sufficiently predominant to support a conclusion that the courts "generally, if not almost invariably", make a distinction. One of the authors of this criticism has discussed this same problem of the element of intent in domicil in an article²⁴ in which he cites in support of his thesis, cases dealing with taxation, estates of decedents and jurisdiction of federal courts without any intimation that they do, or should, establish different doctrines.

22. *Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932); *Dorrance v. Thayer-Martin*, 115 N. J. Eq. 268, 170 Atl. 601 (Prerog. 1934), *aff'd*, 116 N. J. Eq. 204, 172 Atl. 503 (Prerog. Ct. 1934). See Note (1932) 81 U. OF PA. L. REV. 177; (1934) 82 U. OF PA. L. REV. 769.

23. *Raymond v. Leishman*, 243 Pa. 64, 89 Atl. 791 (1914). An examination of the report of that case shows that the foreign attachment statute was construed to require only foreign residence, not foreign domicil.

24. Heilman, *Domicil and Specific Intent* (1929) 35 W. VA. L. Q. 262.

The critics of the orthodox method of dealing with conflict of laws problems have so far given but little demonstration of the operation of the alternative methods advocated by themselves. Perhaps the most important positive contribution is Professor Lorenzen's study of the choice of law to govern the validity of a contract,²⁵ in which he proposes the principle that the contract shall be held intrinsically valid if the requirements of the local law²⁶ of any state with which the contract has a substantial connection be satisfied, unless the execution of the contract is prohibited by some stringent policy of the place of contracting or its performance is illegal under the law of the place of performance. This principle has been accepted by Mr. Heilman and extended by excluding the qualifications.²⁷ Its desirability is, of course, dependent on the acceptance of the premise that the legal enforcement of agreements made between parties is always socially desirable, a premise which is certainly not axiomatic, and which has never been accepted as universally true in any developed system of law. Even with Professor Lorenzen's qualifications, it is not obvious that in all situations the application of the principle would have a desirable result. Should every court enforce against a former employee a clause in a contract of employment which he was compelled by economic necessity to sign and which practically prevents his re-employment in the only occupation for which he is trained, merely because some operative fact may be located, perhaps by intent, in a jurisdiction which would give effect to such a contract? Mr. Heilman's formula goes to the extent of applying to such a contract whichever law will give to it the maximum effect.

One of the most recent suggestions²⁸ for a new approach to that part of the conflict of laws problems involved in the choice of the law to be applied in the decision of cases in which the operative facts occurred in different jurisdictions, discards not only the orthodox approach, but also that of its critics. The suggestion is that the choice should not be based on the relation of the various elements of the transaction in controversy, or any of them, to any jurisdiction or its law, but on the content of the different laws which might be applied. That law is to be chosen as the governing law which will result in a decision of the present case most in accord with justice to the individuals affected. The author of that suggestion gives no clear answer to the obvious question, what is "justice." He states a hypothetical case of a married woman not yet twenty-one years of age who gives to a salesman in one state an order for books which is accepted by the seller in another state.²⁹ He suggests numerous facts which may be present and which may influence

25. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565.

26. That is, the body of law excluding conflict of laws rules.

27. Heilman, *supra* note 6.

28. Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173.

29. *Id.* at 180.

the court but he does not decide for us his hypothetical case. In the last subdivision of his article he frankly concedes that his proposal is academic. "Indeed, it would be little short of fatuous to suppose that judges, having these views pressed upon them, would put aside their stock of assorted doctrines to set to probing in that complex of fact and law which is the typical conflicts case."³⁰ We might add that the judges could not do so if they would. No court, confronted with a case which it must decide in a very limited time if it is to keep pace with its docket, and having before it only those facts which have been presented by counsel whose sole interest is almost always to win the case rather than to guide the court to a just decision, could possibly appraise the results which would follow the application of one of the several possible laws and determine which is most desirable "from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke."³¹ There is no quarrel with the contention that an academic investigation of the results of the traditional conflicts rules and principles to determine the extent to which they promote justice in the individual cases, or to determine some different approach which would produce better results, would be highly desirable. It is not so plain why such an academic investigation in the hypothetical case should be limited to the results which would follow the application of the laws of either the state where the order was given or where it was accepted, with the possible addition of the law of the forum. Perhaps some law entirely unconnected with the transaction or the suit has achieved a solution of the problem which is demonstrably preferable to any of the possibly applicable laws. Ought not our academic investigator discover that fact and then urge that such a law be adopted in the various jurisdictions to apply to all cases whether they involve choice of law problems or not?

In the sense in which the term is employed by Professor Cavers the whole attack upon the traditional concepts of conflicts of laws is academic. It is still almost exclusively critical.³² It may prove to be of great value for the future development of the law but until it develops a constructive method which can be used in the necessarily rough and ready process of deciding cases it cannot claim to have more than an academic standing. Since both the Restatement and the Treatise are intended to state the law as it is for the use of practicing lawyers and judges, it could not be expected that they would discard the traditional method for one which has not yet demonstrated its constructive value in the actual decision of cases, or even in academic discussion. We are justified in appraising these works in the light of their purpose to see how well they have restated the results of the decided cases

30. *Id.* at 204.

31. *Id.* at 192.

32. This statement is not made by way of condemnation. Every new advance in any line of thought must originate in criticism of the existing situation.

and how valuable those restatements will be in guiding the growth of the law in the immediate future along lines that are desirable. In making such an appraisal, the centering of attention on the Treatise rather than on the Restatement is justified by the much greater opportunity which has been afforded to those interested in the subject to familiarize themselves with the contents of the Restatement.

The form of the Treatise is, as stated in the preface, a commentary on the Restatement, that is, the material is arranged on the same classification scheme, and the section numbers of the Restatement appear in the Treatise, followed by another number distinguishing the more numerous sections of the latter. But the Treatise is a commentary in form only; in substance it is an exposition of the individual views of the author. The purpose declared in the preface to state when the author differs from the form of statement of the Law Institute, has not always been adhered to. Thus in Section 50.1 it is said without qualification that where a chattel is taken into a state without the consent of the owner, the state has no jurisdiction to affect his title to the property until he has had an opportunity to move it or until the period of prescription has run. No mention is made of the fact that the section in the original draft of the Restatement³³ which contained that doctrine was omitted from the final draft with a caveat³⁴ that the Institute expressed no opinion on the subject. Again, in his discussion of jurisdiction to divorce³⁵ the author defends the position taken by himself in a former article,³⁶ and incorporated in the first draft of the Restatement,³⁷ that where the parties have separate domicils, there is jurisdiction to divorce only where the new domicile was acquired without fault, without any mention of the inclusion in the final draft of the Restatement³⁸ of the provision that jurisdiction to divorce may be exercised by the state where the parties were last domiciled together as man and wife. The Restatement³⁹ says that jurisdiction to decree nullity of a marriage either from the beginning or from the date of the decree may be exercised by any state which had jurisdiction to divorce; the Treatise⁴⁰ expresses the view that only a court of the state where a marriage was contracted can decree nullity from the beginning, without any indication of disagreement with the Restatement. It is evident that the language of the Restatement will have to be compared in every case with that of the Treatise before there can be any assurance that the latter is an exposition of the former.

33. RESTATEMENT, CONFLICT OF LAWS (Tent. Draft, 1926) § 52.

34. RESTATEMENT, § 102.

35. I TREATISE, §§ 113.1-113.12.

36. Beale, *supra* note 9.

37. RESTATEMENT, CONFLICT OF LAWS (Tent. Draft, 1926) § 118.

38. § 113 (b).

39. § 115.

40. Vol. I, § 115.1.

Except for the clause expressing a purpose to indicate disagreement with the Restatement, Professor Beale's preface makes it plain that his Treatise is intended to express his own views, for that is what he believes the Bar desires, insofar as it desires anything more than the state of judicial authority. He does not resent the charge that his statements are dogmatic, but rather considers that a merit. If it is a merit, the Treatise will rank high as a legal classic, for its style amply justifies the frequent charge of his critics that Professor Beale is a theologian. He tells us in his preface that his present views are the result of a process of trial and error during which original tentative theories were proposed and rejected after criticism by forty classes of students and by his advisers on the Restatement. But there is nothing in the form of his present work to tell of any such process. Principles and rules are stated dogmatically, without any doubt as to their accuracy and validity. Cases which are not in accord with those principles are wrong. Theological also is the reliance upon theoretical reasoning, rather than practical. The discussion of almost every topic begins with the postulating of abstract principles by which the cases which are later stated are to be tested. We may agree with the statement that "an unjust rule or one that does not conform to type is an impracticable rule",⁴¹ but it does not necessarily follow that our justice and theory are to be found solely in abstract concepts. An outstanding example of the abstractions with which the Treatise abounds is the chapter dealing with Foreign Corporations.⁴² The chapter begins with an assertion of the "actual reality" of the group that is incorporated, but thereafter the author insists upon the limitations which theoretically follow from the idea that the corporation, as a legal person, is created by the act of incorporation. For example, it is said that the act of incorporation must take place in the state from which the charter is obtained⁴³ and that the corporation cannot exist outside of the state of incorporation.⁴⁴ It is difficult, at least for one who has made no detailed study of the problem, to grasp the idea of a real group acting only in Delaware when all the members of the group are Minnesota residents who have sent certain papers to Delaware to be filed there and thereby have obtained a Delaware charter to act as a corporation, but do business as a group only in Minnesota.⁴⁵

Limitations of space preclude any attempt to consider with any detail the great amount of material presented in the Treatise, but an indication of

41. 2 TREATISE, at p. 1083. Professor Beale's discussion at this place of the place of theory in any system of law is very valuable.

42. 2 TREATISE, c. 6, §§ 152.1-207.1. In the preface, vol. I, p. xv, it is said that this chapter is in fact a second edition of the non-statutory part of the author's treatise, *FOREIGN CORPORATIONS*, written in 1904.

43. 2 TREATISE, § 103.1.

44. 2 TREATISE, § 166.1. All acts performed outside of the state of incorporation are acts of agents, not of the corporation itself.

45. All of the cases cited in support of the two propositions under consideration were decided in the nineteenth century, except for one which managed to squeeze into the twentieth. *Chapman v. Hallwood Cash Regis. Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969 (1903).

the approach to some of the main problems and a comparison of that approach with the Restatement may be of value.

In the introductory chapter the Restatement has eight sections, the Treatise has fifty-two sections of comment, more or less related to the subject matter of the Restatement, followed by twenty-eight sections of discussion of the nature of rights, interests and status. In general, the approach is that of Dean Pound although a good many of the distinctions are apparently the author's own. Without questioning the validity of this discussion from the standpoint of jurisprudence, it may be questioned whether it has particular value in a work purporting to treat of the subject of conflict of laws. Very little reference is made to it in later portions of the Treatise.

Though it has been the object of much criticism, the treatment of the subject of domicile both in the Restatement and the Treatise impresses the writer of this article as a very great advance in the consideration of the question. In determining the elements which establish the domicile of choice, the rejection of the test of permanence (an intent to remain permanently) in the element of intent and the substitution for it of a test of quality (an intent to make the place a home) is well fortified by the cases cited and, as argued in the Treatise,⁴⁶ better accords with our present day modes of life, since many of us are so situated that we could not have an intent to remain anywhere for the rest of our lives. The argument of the Treatise⁴⁷ that the rule that a married woman has the domicile of her husband has other substantial bases, and does not rest solely on the vanishing fiction of the identity of husband and wife⁴⁸ is unanswerable, though we might not agree with all of the author's conclusions as to when the advantages of having the whole family domiciled in the same place so as to be subject to the same law, outweigh the disadvantages of giving an artificial domicile to a married woman who is not living with her husband.

Another valuable contribution made by the Restatement⁴⁹ and supported by the Treatise⁵⁰ is the definition of jurisdiction as the power to create interests which will be recognized as valid in other states. Manifestly this gives to the term when used in a discussion of the conflict of laws a meaning quite different from that given to it in the discussion of the power of a particular agency to act in a given situation because of statutory or constitutional limitations, but the Treatise especially has not been consistent in limiting the consideration to jurisdiction as here defined. Many of the cases relied upon in the discussion of jurisdiction in general deal with jurisdiction to punish crimes and in none of these is there any consideration

46. Vol. I, § 19.1.

47. Vol. I, §§ 27.1-28.5.

48. *Williamson v. Osenton*, 232 U. S. 619 (1914).

49. § 42.

50. Vol. I, §§ 42.1, 42.2.

of the extent to which the interests thereby created would be recognized elsewhere. Ordinarily there is no such recognition in the absence of a constitutional or treaty provision for the extradition of fugitives from justice. The same objection applies to the chapter on Taxation in the Treatise⁵¹ for which there is no corresponding chapter in the Restatement. All of the cases discussed deal with limitations on the power to collect the tax through the agencies of the state which levied it, and many of them are based on the idea that the imposition of double taxes on the same property interest denies due process of law. In such cases it cannot be said that the Constitution reenacts the conflict of laws principles of the common law so as to be within the scope of a treatise on the conflict of laws.⁵² There seems to be a need for a thorough study of the relation of constitutional jurisdiction between the different states of the United States to the general conflict of laws principles of jurisdiction. In at least one instance, it is evident that the Constitution has permitted a state to exercise power which it could not otherwise exercise. As between the states of our union, any state which can obtain personal jurisdiction over the debtor may garnishee the debt and order its payment to satisfy a claim against the creditor, since the judgment against the garnishee is entitled to full faith and credit and bars subsequent recovery by the original creditor.⁵³ Both the Restatement⁵⁴ and the Treatise,⁵⁵ adopt this as a conflict of laws rule, and the latter does not discuss in this connection cases⁵⁶ which have refused to garnish a party subject to the jurisdiction because they could not protect the garnishee against a subsequent recovery by the original creditor, though those cases support the theoretical argument that a court has no jurisdiction over a relationship unless it has jurisdiction over both parties to it. A similar confusion is found in the discussion of jurisdiction to divorce. The decision of *Haddock v. Haddock*⁵⁷ is treated as an authority for the conflict of laws rule as to jurisdiction instead of being merely an interpretation of the full faith and credit clause of the federal Constitution. The statement of Mr. Justice White in that case that no question was presented as to the right of the state where the husband alone was domiciled to give him a divorce which was effectual within its borders, is said to be a dictum which cannot be accepted because of the assumed principle that if the decree had local efficacy, it must be given full faith and credit, a principle which is not universally true.⁵⁸ The proposition that

51. Vol. I, c. 4A.

52. I TREATISE, § 43.1.

53. *Harris v. Balk*, 198 U. S. 215 (1905).

54. § 108.

55. §§ 108.1-108.4.

56. *Martin v. Nadel* [1906] 2 K. B. 26; *Weitzel v. Weitzel*, 27 Ariz. 117, 230 Pac. 1106 (1924). Neither of these cases appears in the table of cases cited in the TREATISE.

57. 201 U. S. 562 (1906).

58. For example, a judgment in favor of a state for a penalty is not entitled to full faith and credit. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 (1888). The doctrine of that case is embodied in RESTATEMENT, § 443, and the case is cited with approval in 2 TREATISE, § 443.1.

there is jurisdiction in such a case does not rest on the statement in the *Haddock* case but upon the earlier case of *Maynard v. Hill*,⁵⁹ which was not overruled but held to be inapplicable because it dealt only with jurisdiction to give a divorce which would be valid in the territory where it was given.

The chapter on Status in the Treatise is opened by a long discussion of the nature and classification of status. One of the novel conclusions of the author is that minority is not a "status but simply one of the facts of existence which are taken into account by the law in various transactions."⁶⁰ In the discussion of marriage, the Treatise draws a distinction between the contract of marriage and the marriage itself,⁶¹ the former being governed by the law of the place where it is entered into, the latter by the law of the domicil of the parties. This principle sustains the exceptions made in the Restatement⁶² to the rule that a marriage valid where celebrated is valid everywhere. The principle is a recognition of the increasing importance which the courts are giving to the law of the domicil with reference to marriage, but it is not apparent that it has any advantage over the principle that the law of the domicil always governs, which generally will recognize a marriage if valid by the law of place of celebration, though it need not.⁶³ Under the latter principle the law of the domicil could recognize as valid a marriage contracted elsewhere by a ceremony invalid by the law of that place, contrary to the Restatement, section 122. The only cases cited in the discussion of that section in the Treatise hold that such a marriage could be recognized if contracted where there is no civilized law.⁶⁴ These cases are said to be theoretically unsound.

The discussion of the conflict of laws rules governing contracts is, in many respects, the most satisfactory of any in the Treatise, even to one who does not accept all of the conclusions the author reaches. There is much less abstract discussion of the nature of the transactions involved and much more consideration of the actual decisions than in most of the chapters of the Treatise. The origin of the various doctrines is traced, and the influence of the inconsistent positions taken by Story upon the subsequent development of our law on this subject recognized.⁶⁵ The decisions of the federal courts and of the courts of each state as to the law governing the validity of contracts, are separately summarized. On the whole, the reader of this chapter is given an accurate picture of the history and present status of the law on this subject and has the material available for the formulation of his own conclusions if he is not willing to accept those of Professor Beale. Probably

59. 125 U. S. 190 (1888).

60. Vol. 2, § 120.12.

61. Vol. 2, § 121.2.

62. § 132.

63. See Note (1932) 16 MINN. L. REV. 172.

64. *Davis v. Davis*, 1 Abb. N. C. 140 (N. Y. 1876), *aff'd*, 7 Daly 308 (N. Y. 1877); *Phillips v. Phillips*, 38 T. L. R. 150 (P. D. & A. 1921).

65. 2 TREATISE, § 332.5.

much of the merit of this chapter is due to the previous discussions of the subject by Professor Beale and his critics.⁶⁶ It is hardly necessary to say that Professor Beale still adheres rigorously to his principle that only the law of the place where an agreement was made can give binding effect to it as a contract. Giving full weight to his arguments, both theoretical and practical, for such a rule, it still is doubtful whether it should be applied in a case where that place had only an accidental connection with the contract.⁶⁷ The principle of contracts is that the law gives binding effect to the agreements of the parties, and that principle would probably prevail where the effect of the application of the law of the place where the contract was casually made would bind them to something they did not intend or disappoint the reasonable expectations of one of them that the contract would be performed by the other.

In the summary of the decisions of the various jurisdictions,⁶⁸ the conclusion is drawn from a comparison of that summary with the one Professor Beale made in 1909,⁶⁹ that there is a decided tendency to adopt the law of the place of making as the proper law to govern the validity of a contract. An examination of the cases relied on does not support this conclusion. In no one of them is there any recognition by the court of any change in the existing rules. The Nebraska case,⁷⁰ cited as in effect overruling the earlier Nebraska cases which had adopted the intent theory, merely stated that some of the statements in the earlier cases may be criticized, but it also holds that there was no error in admitting evidence as to the law the parties intended to have govern. The other Nebraska case⁷¹ cited in support of the proposition that the law of the place of contracting governs in all cases says that it generally governs, but, after pointing out that the contract involved there was both made and performable in Iowa, adds that there was nothing to indicate an intention of the parties that any other law should govern. The great growth in the number of states now classed as adhering to the law of the place of making is attributable to the inclusion in that group of cases which said that law should govern, though there was no showing that the place of performance differed from the place of making, which cases were excluded from the list in 1909.⁷² The discouraging feature of this summary is that not a single case has been so far

66. Beale, *What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 1, 79, 194, 260; Lorenzen, *supra* note 25; Heilman, *supra* note 6, at 1082.

67. As in *Thomson-Houston Elec. Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137 (1893), where the parties were engaged in business in Illinois and Minnesota respectively, but the contract was made in Missouri while they were attending a convention there.

68. 2 TREATISE, § 332.57.

69. Beale, *supra* note 66, at 206.

70. *First Nat. Bank v. Ernst*, 117 Neb. 34, 219 N. W. 798 (1928).

71. *Noel v. Nat. Union Fire Ins. Co.*, 124 Neb. 734, 248 N. W. 86 (1933).

72. It should be noted that the preface credits others with the formulation of this chapter of the TREATISE, which may account for this difference in treatment.

influenced by the preliminary draft of the Restatement on this subject to recognize the inconsistency of Story's statements on the subject and to re-examine the question in view of that recognition.

In the Treatise it is said that "to draw distinctions between interpretation, obligation, and performance of contracts is one of the most difficult tasks confronting the student of this portion of the Conflict of Laws,"⁷³ yet that task must be performed if we are to govern the first two by the law of the place of making⁷⁴ and the last by the law of the place of performance.⁷⁵ If we must preserve the distinction, should we not limit the last term to excuses for non-performance of the contract, or to provisions for satisfaction of it, created by law independent of any volition of the parties? This suggestion would eliminate what seems to be an obvious error in the statement in both the Restatement⁷⁶ and the Treatise⁷⁷ that the law of the place of performance determines whether the obligation is satisfied by the giving and acceptance of a promissory note. That would be true if the law of any state provided that a contract could, as a matter of law, be so satisfied, but no such rule is conceivably possible. Clearly the parties may expressly agree as to the effect the new transaction shall have on the existing obligation, and, where there is no express agreement, the law merely supplies what it considers the more reasonable provision, obviously a question of the interpretation, or effect, of the second contract, rather than of performance of the first.⁷⁸ The Restatement⁷⁹ properly applies the law of the place of making a release to determine its effect on the prior obligation but the Treatise states that "logically it must be that the place of performance of a contract determines whether it is discharged by a release."⁸⁰

In the discussion of wrongs, the Treatise⁸¹ adheres to the position originally taken by the preliminary draft of the Restatement⁸² applying the law of the place of acting to determine the wrongfulness of conduct which produces injury elsewhere. No mention is made of the elimination of these provisions from the final draft of the Restatement, nor is there any discussion in the Treatise of the greatly limited rule retained in the Restatement, section 382.

73. Vol. 2, § 346.1.

74. RESTATEMENT, §§ 332, 346.

75. *Id.*, § 358.

76. *Id.*, § 365.

77. Vol. 2, § 365.1.

78. The citation of Thomson-Houston Elec. Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137 (1893), in support of this proposition gives an erroneous impression of that case. It is true that the law applied there was the law of the place of payment of the original obligation but the whole argument of Judge Mitchell shows that it was applied because it was the proper law of the second contract, not because it was the law of the place of payment of the first.

79. § 373.

80. Vol. 2, § 374.1.

81. Vol. 2, § 379.1.

82. Preliminary Draft No. 4, §§ 412-414.

The Treatise⁸³ repeats the criticisms Professor Beale has elsewhere⁸⁴ made of the cases of *Young v. Masci*⁸⁵ and *Bradford Electric Light Co. v. Clapper*.⁸⁶ The principal objection to the *Young* case is that it permits a state to attach to acts performed outside of the state (the loan of an automobile) liability for injuries within the state which are only a remote consequence of the act outside of the state. But it would seem that the case may be sustained on the same reasoning that sustains the cases allowing personal jurisdiction to be based on the doing within the state of an act apt to endanger the public safety.⁸⁷ Is it not as reasonable to say that one who loans his car to a borrower to be driven in another state subjects himself to the liability imposed by that state on the owners of all cars driven on the highways of that state, as to say that where he personally drives in that state he subjects himself to the jurisdiction of its courts as to all suits arising from his act? In neither case is there any actual consent. In the latter sufficient reason is found in the need for protecting the citizens of the state from the necessity of suing elsewhere for injuries inflicted upon them within the state by non-resident motorists. In the former case the reason is the requirement of at least the financial responsibility implied in the ownership of an automobile to assure compensation for injuries caused by its operation.

In the *Bradford* case we have a situation where the formula of recognition of rights created by a foreign state having jurisdiction to do so, will not solve the problem, for we have a conflict of inconsistent rights, each created by a state having jurisdiction. Undoubtedly the relationship of employer and employee was in Vermont, where the principal place of business of the employer was located, where the employee resided, and where the contract of employment was made. Vermont then had jurisdiction to provide, as its compensation act did, that the only liability of the employer to the employee should be for the payment of compensation. On the other hand, the injury to the employee was suffered in New Hampshire which had, therefore, jurisdiction to determine what legal consequences should attach to that event. In the absence of any compulsion to do otherwise, we may assume that the courts of either state would have enforced the law of that state and disregarded the inconsistent provisions of the other law.⁸⁸ But the full faith and credit clause does impose a compulsion to recognize the proper law. Since there can be no choice between them on the basis of jurisdiction, the choice must be made on other grounds, and the general recognition of the

83. Vol. 2, §§ 383.1, 401.2.

84. Beale, *Two Cases on Jurisdiction* (1935) 48 HARV. L. REV. 620.

85. 289 U. S. 253 (1933).

86. 286 U. S. 145 (1932).

87. 1 TREATISE, § 84.2.

88. But Stone, J., concurred in the result in the *Bradford* case on the assumption, in the absence of a contrary ruling by the New Hampshire courts, that New Hampshire would recognize the interests created by the Vermont law.

wisdom of the policy of the compensation acts to throw the loss on the employer and permit him to spread it by insurance and pass the cost on to the consumer would seem to justify the choice made. Neither decision warrants the fear apparently felt by Professor Beale that it opens the way for the complete abandonment of some of the fundamental concepts of jurisdiction in the conflict of laws sense.

In the discussion of the chapter on administration of estates the Treatise⁸⁹ expresses disagreement with the premise of the Restatement that it is the purpose of the law of administration to treat the estates in all states as a single thing. For his proposition that they are treated as entirely separate Professor Beale cites two cases decided before the last quarter of the nineteenth century.⁹⁰ His later discussion of the cases dealing with the collection of chattels and claims⁹¹ and with the proof and payment of claims⁹² shows many instances where the estates have not been treated as entirely separate, especially the New York case⁹³ holding that the surrogate may remit the assets collected during the New York administration to the foreign domiciliary executor without paying any claims in New York. This appears to be an instance where Professor Beale has failed to take account of the more recent development of the law, as the American Law Institute wisely decided to do.

The discussion in this chapter⁹⁴ of the appointment of an administrator to sue for wrongful death is particularly unfortunate from the viewpoint of the proper development of the law. It seems to share the confusion, common in our courts, between the administrator as representative of the estate, and as trustee to sue for the benefit of those injured by the wrongful death. It therefore criticizes a construction of a wrongful death statute as vesting the right to recover solely in the domiciliary administrator.⁹⁵ In view of the serious complications which result from permitting suits by administrators in different states,⁹⁶ and the power of the domiciliary administrator to sue anywhere, such a construction is highly desirable, and it probably accords with the dominant intention of the legislatures to vest the power to sue in one ascertainable individual.

89. Vol. 3, § 465.1.

90. *Hill v. Tucker*, 13 How. 458 (U. S. 1851); *Fowle v. Coe*, 63 Me. 245 (1871).

91. 3 TREATISE, §§ 471.1-471.4.

92. 3 *id.* §§ 496.1, 501.1, 503.1.

93. *Matter of Meyer's Estate*, 244 N. Y. 598, 155 N. E. 913 (1927).

94. 3 TREATISE, § 467.6.

95. *Baltimore & O. R. R. v. Evans*, 188 Fed. 6 (C. C. A. 3d, 1911).

96. See for example *Castigliano v. Great Northern Ry.*, 120 Minn. 279, 152 N. W. 413 (1915), giving an attorney for an administrator appointed in Minnesota a lien for his compensation upon the amount of a settlement made with a domiciliary administrator. Common knowledge of the general proportion of recovery claimed by attorneys in such cases justifies the assertion that such a decision results in depriving the dependents of most of the benefit of a recovery for the loss they have sustained.

In a former article the present writer expressed his views on the subject of substance and procedure in the conflict of laws⁹⁷ and a reading of the Treatise leaves him of the same opinion still. It seems remarkable that Professor Beale should here abandon his whole method of approach to conflict of laws problems and substantially adopt that of his critics, as he apparently does in section 584.1 of the Treatise, when his formula of recognition and enforcement of rights validly created elsewhere is so well adapted to solve the problems raised in this connection. If we abandon, as Professor Beale admits we must, the idea that certain rules are inherently rules of substance and other rules of procedure, why not separate our problem into two parts, and determine first whether by the substantive law of the place of transaction the right claimed by plaintiff exists, and then whether by the law of the forum its rules of procedure permit or prevent suit on that right?

The general conclusion of the critics of Professor Beale is that the Restatement of Conflict of Laws should not have been undertaken at this time.⁹⁸ That objection cannot apply to the Treatise for clearly the profession is entitled to a comprehensive statement of the conclusions reached by Professor Beale upon the difficult questions involved in the conflict of laws after he has spent the greater part of a lifetime in studying them. Certainly there has been enough development in this branch of the law since Story's treatise was published, more than one hundred years ago, to call for a new systematic treatment of the subject. The only validity to the objection to a Restatement now is the fear that it may prevent further growth in the law, but that danger is probably exaggerated. The blind acceptance by most courts of Story's formula for determining the law which governs contracts without noticing its internal inconsistency is quite conclusive that, as a general rule, the courts are not able to contribute much to the development of this intricate subject. That development must then be furthered by legal scholars who can devote a large proportion of their time and energy to the peculiar problems involved in the field, and there is no reason to apprehend that the activities of such scholars will be in any degree curbed by the publication of the Restatement. For the practicing lawyer or judge who is confronted with a conflicts problem for solution a consultation of both the Restatement and the Treatise is necessary. Taken alone, the Restatement is a bare skeleton. Unless it can be given flesh by cases found in the state annotations, its meaning can only be thoroughly grasped by considering it in connection with the cases from which it was deduced, and those cases can generally be found only in the Treatise. On the other hand, the Treatise is too much the ex-

97. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933.

98. Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468; Lorenzen and Heilman, *supra* note 3, at 587.

pression of the opinion of one man, not only in its discussion but also in its summary of the cases, to be an altogether reliable guide. On the whole, the changes made in the Restatement from the opinions expressed by Professor Beale in the preliminary drafts of that work and adhered to generally in the Treatise, appear to be improvements. It would be remarkable if that were not so, for those changes were made by a large group of able men, familiar with the subject, and equipped to bring diverse points of view to bear on the problem. It is a noteworthy tribute to the genius of Professor Beale that the changes were not more numerous. The proper use of the material would seem to require a consultation of the Restatement first, then an examination of the cases cited in the corresponding parts of the Treatise, and then a consideration of the interpretation of the cases by Professor Beale, and by the other scholars who have written upon the subject. It is regrettable that, as a rule, these comments by others are not cited in connection with the cases or with Professor Beale's interpretation of them, but are collected in bibliographies at the end of each topic.

Like all reviews, this article is largely critical, because generally it is only the expressions of disagreement that have any value or interest. But the appraisal of the book does not depend on those criticisms alone, but rather on the number and relative importance of the portions criticized when compared with the whole work. Judged by this test, the Treatise makes a high score. The strongest impression it made upon the writer was the great proportion of the questions actually considered by the courts, which could be regarded as settled beyond controversy. We have occupied ourselves so much with the problems as to which there is doubt that we often overstate the uncertainty existing in the law, and it is a relief to have an examination of all the cases show us that things are not so bad as we have feared.